For reasons which I have stated I would therefore dismiss this application with costs.

Application dismissed.

Solicitors: *A. K. J. D'Cruz; Shook Lin & Bok; Lovelace & Hastings.*

LETCHUMI & ANOR. v. THE ASIA INSURANCE CO. LTD.

[F.C. (Ong C.J. (Malaya), Gill F.J. and Abdul Hamid J.) June 16, 1972]

[Johore Bahru — Federal Court Civil Appeal No. 118 of 1971]

Insurance — Motor taxi — Hiring of — Subsequent re-hiring of taxi — Driver not authorised to drive the taxi — Express prohibition by owner — Effect of.

Road Traffic — Third party risks — Insurance coverage — Duty of insurers to satisfy judgments against persons insured in respect of third party risks — Road Traffic Ordinance, 1958, s. 80.

Practice and Procedure — Appeal — New point raised on appeal — Discretion of appellate court to consider it in the interest of justice.

This appeal was against the dismissal of a claim against the respondents under section 80(1) of the Road Traffic Ordinance.

On February 26, 1962, a taxi driver named Raman sustained fatal injuries in a collision with another taxi driven by one Quek Ah Seng. It was clear that the insured/owner had hired the taxi out to one Lim Siew Liew who, on this particular occasion, had re-hired the vehicle to the said Quek. On May 27, 1965, the High Court awarded the appellant damages against Quek Ah Seng in the sum of $26,700. However, the owner of the car was insured at the relevant date against third party risks, with the respondents. Therefore, the appellants made a claim against the respondents under section 80(1) of the Road Traffic Ordinance, which was dismissed.

In this appeal, a new point was raised by the appellants as to the question whether there was a subsequent ratification by the insured, on receipt of $15 from Lim Siew Liew as hiring charges, of the grant of permission by Lim to Quek to drive the taxi.

The point in issue was whether Quek was one of the persons insured by the policy.

Held, dismissing the appeal: (1) There were no circumstances in this case from which it could be implied that the owner authorized Quek to drive the taxi. The uncontroverted evidence showed that the said Lim Siew Liew had been expressly prohibited by the insured from allowing the vehicle to be driven by any other person. Moreover, the acceptance of the payment for the hiring charges was not a ratification by the insured of the unauthorized re-hiring of the taxi to Quek;

(2) although the point regarding ratification was not raised before the trial judge, the appellate court would consider it in the interests of justice.

Per curiam: An omission, at the trial, by inadvertance or otherwise, to canvass an arguable point, is not the same thing as abandoning it altogether — which would have precluded the court from re-opening and re-considering the matter.

Cases referred to:-

(1) *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 1 W.L.R. 409; [1953] 1 W.L.R. 1120, C.A.

(2) *Freeman* v. *Rosher* 13 Q.B. 780; 116 E.R. 1462.

(3) *Marsh* v. *Joseph* [1897] 1 Ch. 213 at pp. 243, 246.

(4) *Imperial Bank of Canada* v. *Begley* [1936] 2 All E.R. 367.

(5) *Manap bin Mat* v. *General Accident, Fire and Life Assurance Corpn. Ltd.* [1971] 1 M.L.J. 134.

(6) *Digby* v. *General Accident, Fire and Life Assurance Corpn. Ltd.* [1943] A.C. 121.

(7) *Monk* v. *Warby* [1935] 1 K.B. 75.

FEDERAL COURT.

P. M. Williams for the appellants.

Leong Wai Yin for the respondents.

Ong C.J. (Malaya): On February 26, 1962 a taxi-driver named Raman sustained fatal injuries in a collision with another taxi driven by one Quek Ah Seng. The appellants are Raman's legal personal representatives. On May 27, 1965 the High Court at Johore Bahru awarded them damages against Quek Ah Seng in the sum of $26,700 and costs. Quek was driving a vehicle of which the owner was insured at the relevant date against third party risks with the Asia Insurance Co. Ltd. The appellants' claim, made subsequently against this insurance company under section 80(1) of the Road Traffic Ordinance 1958, was dismissed by the High Court at Johore Bahru on October 20, 1971. They now appeal against such decision.

Section 80(1) is the well-known provision making it obligatory on insurers to satisfy judgments obtained against persons insured in respect of third party risks — "being a liability covered by the terms of the policy". The question in issue was whether Quek, while driving the taxi, was one of the persons insured by the policy. The learned trial judge held that Ng Chong Ern, the owner of the taxi who was "the insured" under the policy, had only authorised Lim Siew Liew, a licensed taxi-driver then hiring the vehicle, to drive it and that Quek had no authority, express or implied, from the insured to do so; consequently the insurers were not liable under section 80(1) to indemnify Quek against the judgment obtained by the appellants against him.

At the trial of the action the appellants, as plaintiffs, called no evidence, but relied only on these agreed facts: (a) that the taxi driven by Quek was owned by Ng Chong Ern and it was insured against third party risks by the defendants; (b) that the policy covered Ng Chong Ern and any person driving the taxi on his orders or with his permission.

Under the policy issued to Ng Chong Ern the insurers undertook to indemnify any "authorised driver" against third party claims and in the Schedule "authorised driver" is defined as any of the following: (a) the insured; (b) any licensed taxi-driver driving on the insured's order or with his permission; (c) any other person provided he is in the insured's employ *and* is driving on his order or with his permission.

In my opinion the appellants' claim to indemnity, under the terms of the policy, could only succeed if they established that Quek was driving the taxi with the permission of Ng Chong Ern. Quek was not in the insured's employ, so that he must be brought within the terms of paragraph (b) to be an authorised driver under the policy. Alternatively, dehors the policy, they could have founded their claim on the provisions of section 80(1) of the Ordinance which reads: —

"If, after a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to the person

by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

Then, of course, they should, in the first place, have sued not only Quek, but also Lim Siew Liew as well — the latter being vicariously liable on the ground that Quek was driving the vehicle for the benefit of Lim, thus constituting him Lim's agent: see *Ormrod* v. *Crosville Motor Services Ltd.*[1] The respondents would thus have been bound under section 80(1) to satisfy the judgment obtained against Lim under the following terms of the policy: —

"AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.

Nothing in this Policy or any endorsement hereon shall affect the right of any person entitled to indemnity under this Policy or of any other person to recover an amount under or by virtue of the Legislation.

But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the Legislation."

It is said that the appellants were not aware, until trial of the action for damages against Quek, that he was not one of the persons authorised by the insured to drive the taxi. Had there been interrogatories before the trial, or any statement of agreed facts pursuant to the Practice Directions issued on October 19, 1970, the appellants' solicitors would not have been taken by surprise. In any event, had an application been made, even at that late stage, to join Lim Siew Liew as defendant, in the interests of justice, and for the trial to be adjourned for necessary amendments in the pleadings, such an application would undoubtedly have been allowed by the trial judge, upon payment of the costs thrown away. Having failed to use this trump card which they undoubtedly held, I am afraid that it is now too late for the error to be remedied.

Lim Siew Liew was the hirer of this particular taxi, on a long term basis since 1959, three years prior to the accident. He admitted in his evidence that Ng Chong Ern had told him that the taxi was hired to himself only and that he alone could drive it. He was further told "not to re-hire it to another person without his (Ng's) knowledge or permission". This witness went on to say that on the relevant date he had asked Quek to drive the taxi, he himself being too ill to do so. He did not tell Ng Chong Ern about it and had no time to do so. He had known Quek for 20 to 30 years — they were living in the same house — but Ng Chong Ern did not know Quek at all. Lim Siew Liew's evidence stood uncontradicted.

Quek in his evidence said he did not know any person by the name of Ng Chong Ern. The latter's son, Ng Keok Keng, who assisted his father in his business, fully corroborated Lim Siew Liew as to the prohibition against any other person being allowed to drive the hired vehicle. Ng Chong Ern had died in December 1964 — which explains why the son was called as a witness. It is also of some significance that Ng Keok Keng mentioned the fact that his father was — as he himself continued to be — an agent of this insurance company. As such Ng Chong Ern would have been well aware of the terms of the policy which imposed limitations as to the persons covered by insurance when driving an insured vehicle — not being the insured himself. This was not only highly probable, but also corroborated the admission of Lim Siew Liew that Quek was driving the taxi on the day of the fatal accident contrary to an express prohibition. As the learned trial judge put it —

"The incontrovertible evidence is that the hirer was expressly prohibited from allowing the car to be driven by any other driver".

I am therefore in full agreement with the judge that there were no circumstances in this case from which it can be implied that the owner must have authorised Quek to drive the car. That Lim Siew Liew had been expressly prohibited by the insured from letting Quek drive the taxi is a finding of fact by the trial judge. To hold otherwise would have been in disregard of uncontroverted evidence. We are therefore bound to uphold this finding.

A new point, however, has been raised in this appeal, which was never argued in the court below. In their defence the respondent company had expressly contended that Quek was not one of the persons driving the vehicle by the order or with the permission of their insured. No reply was filed. Nevertheless the point clearly in issue at the trial was whether or not the grant of permission by Lim Siew Liew to Quek — although without the consent of the insured — was subsequently ratified by the latter. It is true that the general rule *delegatus non potest delegare* must be held to apply, especially where there was an express prohibition. Nevertheless, matters could have been put right by proof of subsequent ratification. This is a point not considered in the judgment of the trial judge — since it was not raised and argued before him — but it must, in my opinion, be considered by us in the interests of justice. An omission, at the trial, by inadvertence or otherwise, to canvass an arguable point is not the same thing as abandoning it altogether — which would have precluded us from re-opening and reconsidering the matter. I have therefore anxiously scrutinised the evidence, since the question of ratification is partly a question of law and partly one of fact. Lim Siew Liew had stated in his evidence on the relevant point as follows: —

"I know that on 26th February 1962 the taxi was involved in an accident.... For that day he (Quek) paid me $15. I paid this to Ng Chong Ern about a week later.... Now I say that as soon as I learnt about the accident I saw Ng Chong Ern. I say that as soon as I learnt about the accident I saw Ng Chong Ern. I did not pay him the $15. As Quek Ah Seng gave me $15 I gave the whole sum to Ng Chong Ern. I did not make any money at all that day. I paid Ng Chong Ern for use of car at the most $20 per day. For that day I gave Ng Chong Ern the $15 I received from Quek Ah Seng. When I gave him the money I told him that Quek Ah Seng had driven the taxi and that was the sum I received from him. Ng Chong Ern did not say anything.... The arrangement had been that I was allowed to deduct expenses first, *i.e.* food and petrol. This was a special arrangement. I agree that the *actual arrangement was that I had to pay $20 in any event. But with this Towkay I could*

pay less. Ng Chong Ern did find fault with me for having taken Quek Ah Seng without his knowledge.... Quek Ah Seng paid me the $15 much later. As a result of the accident he was admitted to hospital. He paid me after his discharge. I cannot say how long he was in hospital."

Does receipt of the $15 from Lim Siew Liew under the circumstances amount to ratification by the insured of Lim's giving the taxi to Quek for the day?

"Receipt of money, the proceeds of an illegal distress, is not a sufficient ratification of the illegal acts of the agent levying the distress, *unless the principal has knowledge of the illegality:*"

see *Halsbury* Vol. 1, page 175, citing *Freeman* v. *Rosher.*(2) It may be said that *prima facie* this case supports the appellants' plea of ratification, since Ng Chong Ern had full knowledge of the accident by the time he received the $15 payment for the unauthorised use of his taxi. Upon a close reading of the case, however, I think the facts are readily distinguishable. In the instant case Lim Siew Liew was in any event under a contractual obligation personally to pay $20 a day, or whatever lesser sum Ng Chong Ern agreed to accept. This insured had every right to be paid the debt owed by Lim Siew Liew. That Quek was the driver on that particular date was wholly irrelevant to the payment for the daily hiring due by Lim Siew Liew to Ng Chong Ern. Acceptance of such payment was therefore not a ratification of the unauthorised re-hiring of the taxi to Quek.

Moreover —

"To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist: (1) the acts must have been done *for and in the name of the supposed principal,* and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were": ;

per Lord Russell of Killowen C.J. in *Marsh* v. *Joseph;*(3) see also *Imperial Bank of Canada* v. *Begley.*(4)

It has further been contended by counsel for the appellants that Lim Siew Liew being one of the persons entitled under the policy to be indemnified, he was a person insured, so that his permission given to Quek to drive the taxi should have the effect of bringing Quek within the definition of "authorised driver". We were referred to *Manap bin Mat* v. *General Accident, Fire and Life Assurance Corpn. Ltd.*(5) for the extended meaning of "the insured" as decided by the Court of Appeal in Singapore, following *Digby's* case.(6) In my opinion, it is sufficient to say that the extended meaning of "insured" in *Manap's* case is clearly inapplicable here. There, the driver was a person authorised by the owner of the car to drive it. By clause 2 of section II of the policy the contract indemnifying the owner must necessarily be extended to cover his driver also, for the obvious reason that the owner is vicariously liable for the driver's negligence. In that sense the authorised driver has to be treated "as though he were the insured"; otherwise no one but the policy holder himself can have any claim to indemnity. This, however, does not mean that any authorised driver, as the agent of the policy-holder, may be treated for all purposes as if he were the insured himself. An agent can only bind his principal when acting within the scope of his authority. Lim Siew Liew was clearly not acting as the policy-holder's agent, but on his own account, when he gave the taxi to Quek. The definition of "authorised driver" was unambiguous and the *contra proferentem* rule, therefore, could have no application. Had judgment been obtained against Lim Siew Liew, the provisions of section 80(1) would have obliged the respondents to satisfy the judgment, leaving it to them to recover from him whatever they can under the terms of the policy. He would thus have been indemnified "as though he were the insured" and, for that very reason, he would have been bound to reimburse them for their loss.

It is most unfortunate for the appellants and dependants of the deceased that they must fail in their claim against the respondents, but such is the law. So it would seem that the only recourse left to them is against possibly a man of straw, Lim Siew Liew, on the principle enunciated in *Monk* v. *Warby.*(7) I would dismiss this appeal with costs.

Gill F.J. and **Abdul Hamid J.** concurred.

Appeal dismissed.

Solicitors: *Williams & Tennakoon; Leong Wai Yin & Co.*

PUBLIC PROSECUTOR v. FONG HONG & ANOR.

[A.Cr.J. (Suffian F.J.) July 1, 1972]

[Kuala Lumpur — Raub Criminal Appeal No. 3 of 1972]

Road Traffic — Carrier's licence — Non-compliance of conditions attached thereto — Whether compliance with maximum permissible load to be determined by weigh-bridge or by volume of logs carried — Road Traffic Ordinance, 1958, ss. 53, 143(7A).

This was an appeal against the decision of the learned magistrate.

The question to be determined was whether, for the purpose of calculating the weight of the load carried by the lorry in question when the load consisted only of logs, a weigh-bridge may be used, as contended by the public prosecutor, or was it to be determined by the volume of the logs, as the owner and driver of the lorry contended. The maximum permitted laden weight of the lorry was not to exceed 215 cwts. However, it was found to be overweighed by 3 tons 10 cwts. and 2 qrs.

The learned magistrate held that the load fell to be determined by the volume, as set out in the special condition of the carrier's licence:

> "Notwithstanding any condition contained in this licence. for the purpose of calculating the weight of the load carried by the vehicle authorized herein when the load consists of logs only, 40 cubic feet of logs shall be deemed to be equal to one ton in weight."

The learned magistrate acquitted and discharged both respondents without calling on their defence.

The public prosecutor appealed.

Held, dismissing the appeal: (1) section 53 of the Road Traffic Ordinance merely states who have power to stop lorries and to require them to be weighed and what they have to do after weighing. It does not prescribe the method of weighing lorries;

(2) the court must assume that the special condition in this haulage permit had been imposed by the licensing board. The words "shall be deemed" in the special condition must